

RONALD VALMONTE

IBLA 84-644 Decided June 14, 1985

Appeal from decision of the Wyoming State Office, Bureau of Land Management, rejecting simultaneous oil and gas lease application W-88563.

Reversed and remanded.

1. Oil and Gas Leases: Applications: Generally -- Oil and Gas Leases:
Applications: Filing

Where amended regulations define any person or entity in the business of providing assistance to participants in the Federal simultaneous leasing program as one who signs, prepares, completes, or formulates applications, an entity which merely provides an applicant with parcel recommendations in the form of parcel numbers only has not "formulated" the application within the meaning of 43 CFR 3112.0-5 or 43 CFR 3112.2-4.

APPEARANCES: Ronald Valmonte, pro se; Andrew L. Tarshis, Chief, Leasing Section, Wyoming State Office, Cheyenne, Wyoming, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Ronald Valmonte has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated May 17, 1984, rejecting his simultaneous oil and gas lease application W-88563. Valmonte's application was drawn with priority for parcel WY-587 in the September 1983 simultaneous oil and gas lease drawing.

BLM rejected Valmonte's application because he failed to indicate on his lease application the name of an entity which had provided assistance with his application. Part B (Form 3112-6a) of Valmonte's application contained a designated space for insertion of the full name, address, and zip code of a filing service. Valmonte left that portion blank, and made no reference whatsoever to any entity or person that provided assistance to him on his application. BLM determined that Wesco Oil Properties (Wesco) provided assistance to Valmonte in filing his application and, accordingly, rejected his simultaneous oil and gas lease application, citing 43 CFR 3112.2-4.

In his statement of reasons for appeal, Valmonte argues that:

I filed the application myself * * *. Wesco Oil Prop. did not assist in filing my application. Wesco Oil Prop. is an Advisory

group and not a filing service. Wesco Oil Prop. affirmatively told me to leave this section blank for this reason. I received from Wesco Oil Prop. recommendations on certain parcels. I decided myself what to do with the recommendations. [Emphasis in original.]

On February 4, 1985, the Board issued an order requesting that BLM provide an explanation of how it determined that Valmonte was receiving assistance, including copies of any supporting documents. The Board also requested that Valmonte provide a copy of his agreement with Wesco.

On March 5, 1985, Valmonte filed a copy of his advisory agreement with Wesco. Therein, Valmonte agreed to pay \$ 1,200 for 8 "recommendations." The agreement states that the fees paid by "Client" are for "Advisory Services Only." Section 4 of the agreement states:

Selection: The suggested recommendation of the parcels is to be made by WESCO OIL PROPERTIES, INC., from a list provided by The Bureau of Land Management. WESCO OIL PROPERTIES, INC., shall under no circumstances participate in any profits or overriding royalties acquired by the Client. Each filing period, WESCO OIL PROPERTIES, INC., will forward to the Client parcel recommendations. The filing fees to be paid to the appropriate agency are to be borne by Client. All fees paid are for advisory services only and are non-refundable.

Section 5 of the agreement provides that the Advisory Agreement constitutes the entire understanding of the parties and that the client received no inducement, oral or implied, to enter into the agreement other than those set forth in the agreement.

On March 11, 1985, BLM responded to the Board's order. It provided copies of Wesco literature included in filings made by other applicants (Exhs. A-D to BLM's Response). The literature consists of parcel recommendation sheets prepared by Wesco and sent to their clients in November 1982, July 1983 and September 1983. BLM points out that the latter two sheets specifically direct the client to leave the filing service field blank on the application. Further BLM states that Wesco clients are provided a pre-addressed envelope (Exh. F). BLM states that identification of the envelope provided the basis for linking Valmonte with Wesco. While appellant paid his filing fee with his own check, BLM asserts that other Wesco clients were provided cashiers checks drawn by Wesco and made out to BLM in the name of the client. 1/

1/ We note that the parcel recommendation sheet for November 1982 (Exh. A) stated: "Enclosed you will find a cashiers check made payable to the Bureau of Land Management on behalf of yourself in the amount of \$600.00 which represents the filing fee on 8 parcels." The July 1983 recommendation sheet advises the client to enclose "your cashiers check," while the September 1983 sheet states, "enclose your personal check." These sheets show the evolution of Wesco's procedures.

The recommendations provided to Wesco clients, BLM argues, are merely numbers and there is no additional information provided which would aid in making a choice. The degree of choice exercised by an applicant, BLM observes, is critical in its determination of whether or not an applicant is receiving "filing service assistance." Assistance which is limited to evaluation of parcels, BLM states, is not "filing service assistance." Evaluation for BLM's purposes involves the specifying of varying amounts of information, "all aimed at providing the buyer with some informed basis for making a choice." BLM stated that firms who provide such information for buyers in this form (which BLM described as "tout sheets") are not considered as filing services. The services provided to appellant, BLM argues, are not of the evaluation nature but rather constitute filing service assistance.

[1] The question presented is whether the providing of "recommendations" under the circumstances of this case is assistance within the meaning of the regulations. We think not.

The regulation governing filing assistance, 43 CFR 3112.2-4, provides:

Any applicant receiving the assistance of any person or entity which is in the business of providing assistance to participants in the Federal simultaneous oil and gas leasing program shall indicate on the lease application the name of the party or filing service that provided assistance.

In 1982, the term "any person or entity which is in the business of providing assistance to participants in the Federal simultaneous oil and gas leasing program" was defined in 43 CFR 3100.0-5(d) (1982) as:

[T]hose offering services for consideration in connection with the acquisition of Federal oil and gas leases. Included in this definition are those enterprises, commonly known as filing services, which sign, formulate, prepare, offer advice on formulation or preparation, mail, deliver, receive mail or otherwise complete or file lease applications or offers for consideration. Excluded from the definition are those services which only tangentially relate to Federal oil and gas lease acquisition, such as general secretarial assistance, or general geologic advice which is not specifically related to Federal lease parcels or leasing. [Emphasis added.]

Under this regulatory definition, Wesco was clearly a filing service as it offered advice on the preparation of lease applications for a consideration. See Bernard S. Storper, 60 IBLA 67 (1981). At the time these applications were filed, however, this regulation was no longer in effect. In final rulemaking, published July 22, 1983, effective August 22, 1983, the definition of this term was revised and repromulgated at 43 CFR 3112.0-5 to mean

those enterprises, commonly known as filing services, which sign, formulate, prepare or otherwise complete or file applications for oil and gas leases for consideration. All other services such as general secretarial assistance or general geologic advice whether or not it is specifically related to

Federal lease parcels or leasing, are excluded from this definition. [Emphasis supplied.]

48 FR 33678 (July 22, 1983).

Despite the fact that this amendment deleted language which expressly brought enterprises which "offer advice on formulation or preparation [or] mail, deliver [or] receive mail," clearly within the purview of the regulatory definition, the preamble to the new regulation stated that:

The definition of the term "person or entity providing assistance to the participants in the Federal simultaneous oil and gas program" contained in § 3112.0-5 of the final rulemaking is intended to cover not only those entities that perform services commonly known as "filing services" but also those that furnish advice or counseling that is directly related to the filing of simultaneous oil and gas lease applications. Agreements with these types of entities must be identified in the application. [Emphasis supplied.]

Subsequently, on August 19, 1983, the Department published a Federal Register notice at 48 FR 37656, which stated, in part:

Pursuant to the final rulemaking of July 22, 1983 [48 FR 33648] revising the provisions of the existing regulations in Groups 3000 and 3100, the Bureau of Land Management hereby gives notice that effective August 22, 1983, it will strictly enforce the provisions of amended § 3112.2-3, which pertain to the designation of other parties in interest and § 3112.2-4 which pertain to filing assistance. The purpose of the Bureau's strict enforcement of amended §§ 3112.2-3 and 3112.2-4 is to preserve the integrity of the simultaneous oil and gas leasing program by ensuring against multiple filings on a single parcel as prohibited by amended § 3112.5-1.

Amended § 3112.2-4 requires identification of any party rendering any type of assistance in the filing of an application submitted under Part 3112. [Emphasis added.]

In this case Wesco provided Valmonte with 8 recommendations for \$ 1,200 (or \$ 150 per recommendation) and an envelope in which to send his application to BLM. There is no evidence of any other filing assistance by Wesco in this case, even though BLM has alleged that Wesco has provided filing fees for other clients. The question before the Board is whether under the new regulation, the activities performed for Valmonte make Wesco a "filing service" for Valmonte which would serve as a basis for rejection of Valmonte's applications because of his failure to place Wesco's name and address in the indicated box on the application.

Leaving aside, for the present, the regulatory preamble and the subsequent notice and focusing solely on the language of the original regulation and the amended version, it would be virtually impossible to conclude that Wesco's services were within the scope of the amended regulatory provisions.

Thus, original version had clearly and unambiguously provided that those business entities which provided "advice" for compensation must be disclosed. The amended version not only deleted this language, but added another sentence which expressly stated that, with the exception of those services "which sign, formulate, prepare or otherwise complete or file applications," all other services including those which provide "general geologic advice whether or not it is specifically related to Federal lease parcels" are excluded from this definition. (Emphasis added.) It is, indeed, difficult to conceive a more clearly delineated regulatory history for the proposition that services which merely offer advice need not be disclosed.

In opposition to this clear interpretation, there is only the regulation's preamble and the subsequent notice. However, the language in the preamble to the effect that the definition of a person or entity providing assistance is "intended to cover * * * all those that furnish advice or counseling that is directly related to the filing of simultaneous oil and gas lease applications" can best be described as directly contradicting the express regulatory language.

A similar infirmity infests the August 19, 1983, notice, published in the Federal Register. Thus, the statement in the notice that "amended § 3112.2-4 requires identification of any party rendering any type of assistance in the filing of an application submitted under Part 3112" is not reflective of the clear language of the regulation limiting the definition of filing service assistance to those entities which sign, formulate, prepare or otherwise complete or file applications and no other. (Emphasis added.)

We do not know why BLM deemed it necessary to amend the definition of "filing service" in July 1983. But, having done so in clear and unambiguous language, BLM is obligated to enforce the regulation as it is written. Regulatory preambles and subsequent notices may be useful aids in the interpretation of an ambiguous regulation, but they cannot supplant the regulation, itself. In other words, we cannot say that the regulation says what it does not say or prescribes what it does not, in fact, prohibit. To the extent that the regulatory language does not comport with the intent of the drafters of the regulation, it is necessary to amend the regulation in the manner prescribed by law (5 U.S.C. § 553 (1982)) so as to give fair notice to those who are charged with abiding by it.

The dissent, while implicitly accepting the above analysis, suggests that the decision below should be affirmed because, given the facts of the instant case, Wesco "formulated" appellant's application. The dissent concludes that "even though Wesco did not actually fill in Valmonte's application with the recommended parcels, by its chosen methodology of recommendation it formulated Valmonte's application because Valmonte was, in reality, presented with no choice over parcel selection." We do not agree.

The dissent differentiates between the provision to a client of a list of parcel numbers unaccompanied by any geological data and the provision of such a list with supporting justification for the selections. The former, the dissent suggests, requires disclosure while the latter does not. The reason for this, under the dissent's analysis, is that in the former situation the putative applicant has no basis for making his or her own selection,

whereas in the latter situation, the applicant has been provided with sufficient information to make an informed choice.

The problem with this theory is that it not only presupposes ignorance in the first applicant but it also presumes knowledge in the second applicant sufficient to rationally interpret geological information. If the first applicant were, in fact, knowledgeable about the geology of the area he might well be using Wesco to doublecheck his own conclusions. On the other hand if, as is all too often the case, the applicant is totally unfamiliar with geological concepts, submission of justifying information would in no wise increase the applicant's ability to make an informed choice. Thus, the attempted dichotomy, as a practical matter, is intrinsically flawed.

More importantly, as a legal matter, there is no way that Wesco can be said to have actually "formulated" appellant's application. Unlike the situation in John G. O'Leary, 86 IBLA 131 (1985), where the filing service actually filled in the application, prepared a remittance with the proper amount to cover filing fees, and transmitted the application to the applicant with instructions that "your only responsibility is to sign your name on Part B as it appears on Part A," Wesco neither filled in any part of Part B nor sent any remittance for the filing fees. Rather, completion of Part B and the submission of a remittance were the sole responsibility of appellant. The fact that he chose to make application for all of the parcels recommended by Wesco should not be permitted to obscure the fundamental reality that this was his free choice. ^{2/} Appellant may well have formulated his application based upon the advice supplied by Wesco, but that formulation was, nevertheless, his own.

Since it is impossible to conclude that Wesco either signed or formulated or prepared or otherwise completed appellant's application, there is no basis for concluding under the present regulatory scheme that Wesco was required to be listed on Part B. That being the case, the decision rejecting appellant's application cannot be sustained.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case files are remanded for further action not inconsistent with the views expressed herein.

James L. Burski
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge

^{2/} Under the dissent's analysis, had appellant chosen six of the eight recommendations provided by Wesco, or, alternatively, added an additional selection of his own, Wesco would not be considered to be a filing service.

ADMINISTRATIVE JUDGE HARRIS DISSENTING:

While I agree with much of what the majority opinion sets forth regarding the wording of the 1982 regulation and the 1983 revision, I disagree with the conclusion that the facts of this case are not covered by the applicable regulation, 43 CFR 3112.0-5.

That regulation includes enterprises that "sign" applications, "formulate" applications, "prepare" applications or "otherwise complete or file" applications. All other services, "such as general secretarial assistance or general geologic advice," are excluded.

The preamble to the 1983 regulations states that 43 CFR 3112.0-5 is intended to cover not only filing services but also those entities that "furnish advice or counseling" that is directly related to the filing of applications. Likewise, the August 19, 1983, Federal Register notice provided that the regulation, 43 CFR 3112.2-4, would require identification of any party rendering any type of assistance in the filing of an application. That notice, however, made no mention of 43 CFR 3112.0-5 and in no way revised or amended that regulation.

My analysis of this case is guided by the regulatory language of 43 CFR 3112.0-5. BLM's intention to include advisory or counseling services within its ambit may only be sustained if the language of the regulation supports such an interpretation. Likewise, notice that BLM would strictly enforce 43 CFR 3112.2-4 to include "any assistance" must be read in light of the language of 43 CFR 3112.0-5, and only that assistance outlined in the regulation is encompassed by the definition of "person or entity providing assistance."

I conclude, based on the facts of this case, that with regard to appellant's application, Wesco was a person or entity in the business of providing assistance, and appellant was required to list Wesco's name and address on his application. While Wesco did not sign, prepare, complete or file Valmonte's application, I find that it did, in fact, formulate his application. 1/

The completion of a simultaneous oil and gas lease application involves clerical acts in accordance with various listed instructions on the application. Parcel identification, however, requires that the applicant somehow determine what selections to make. Given the expense of participating in the simultaneous system, an applicant is obviously interested in applying for the most desirable parcels. Thus, in this case Valmonte paid Wesco \$ 1,200 for 8 "recommendations." The presentation of these "recommendations" by Wesco is, as pointed out by BLM, merely in the form of parcel numbers. No information

1/ "Formulate" is defined in Webster's's Seventh New Collegiate Dictionary (1972) at page 329 as follows: to reduce or to express in a formula; to put into a systemized statement or expression; DEVISE.

is provided to the client in order for the client to evaluate the "recommendations." 2/ Clearly, one who has paid \$ 150 per "recommendation" is not going to ignore such a "recommendation" in favor of a blind selection. Therefore, even though Wesco did not actually fill in Valmonte's application with the recommended parcel numbers, by its chosen methodology of recommendation, it formulated Valmonte's application because Valmonte was, in reality, presented with no choice over parcel selection. 3/ The majority apparently would require that the application actually be filled in by the filing service to meet the "formulate" test; however, such a construction actually negates the "formulate" test because an enterprise which fills in applications clearly is one that prepares applications within the meaning of 43 CFR 3112.0-5.

I cannot ignore that Wesco's services in this case, in fact, fall within the definition in 43 CFR 3112.0-5. For that reason, the exclusionary language of that regulation excepting all other services, including secretarial assistance and general geological advice, is not applicable. The regulation governing filing assistance, 43 CFR 3112.2-4, required that Wesco's name be included on the application. 4/ Pursuant to 43 CFR 3112.5-1(a), any application determined by adjudication as failing to meet the requirements of 43 CFR Subpart 3112 "shall be rejected." Valmonte's application was properly rejected by BLM since he failed to comply with 43 CFR 3112.2-4. 5/

For the above-stated reasons, I dissent from the majority opinion.

Bruce R. Harris
Administrative Judge

2/ The Wesco parcel recommendation sheets provided by BLM (Exhs. A-D) each state:

"Where it calls for the parcel selection, use the following recommendations: "

____ ____ ____ ____"
____ ____ ____ ____"

Thus, the sheets allow space for eight recommendations which Wesco directs the client to "use."

3/ Payment of \$ 150 for each recommendation belies Valmonte's statement that he decided what to do with the recommendations. In addition, his application in the case file shows that he selected 8 parcels for a filing fee of \$ 600 in the September 1983 drawing.

4/ The fact that Wesco advised Valmonte not to place its name on the application is not dispositive where disclosure was required by the regulations.

5/ Failure to comply with 43 CFR 3112.2-4 is not a trivial or nonsubstantive error, as identified by the court in Conway v. Watt, 717 F.2d 512, 516 (10th Cir. 1983).

